BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DWIGHT W. FOLKS Claimant	)	
VS.	)	
STATE OF KANSAS Respondent	)	Docket No. **1,059,490**
AND	)	
STATE SELF-INSURANCE FUND Insurance Carrier	)	

ORDER

The self-insured respondent requests review of the May 22, 2012 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Sally G. Kelsey, of Lawrence, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits dated March 30, 2012, deposition of Edward Prostic, M.D., dated April 27, 2012, and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's meniscus injury and need for a total knee replacement arose out of and in the course of his employment with respondent.

Respondent requests review of the following:

1. Whether the ALJ erred in finding that claimant's alleged work injury is the prevailing factor in causing his need for total knee replacement.

2. Whether claimant's total knee replacement surgery arose out of and in the course of his employment with respondent.

3. Whether the prevailing factor test applied in determining whether medical treatment is owed under the Kansas Workers Compensation Act.

Claimant argues that his accidental injury is compensable, and, therefore medical treatment and temporary total disability compensation should be ordered paid. Claimant further argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was hired as a senior carpenter by respondent. Claimant testified he did not have any prior injuries, restrictions or limitations imposed by a doctor before his injury on December 6, 2011. Claimant described his right knee injury:

> That morning I was going up and down a ladder. Had been up and down a ladder several times. And as I was going up the ladder this time, my right toe got hooked up about halfway underneath the stair, and I kind of jolted my knee. Kind of dropped down a rung. Caught myself. And as when I did take my first step back up I felt my knee pop. And I went on back up to work and as the rest -- I worked the rest of the day up and down the ladder. I noticed my knee starting to swell. And I finished work that day and went back to work the next day. I went home that night and iced it, got up the next morning, seemed to -- didn't feel too bad. I went back to work the next day of the 7th and by about 10:30, quarter to 11 that morning, my knee was swollen. I couldn't hardly walk on it. And they took me in to the emergency room.[1]

On December 9, 2011, claimant received restrictions of no climbing, repetitive bending, stooping, kneeling or squatting. Respondent was not able to accommodate these restrictions.

An MRI of claimant's right knee was performed on December 29, 2011. The MRI revealed a chronic tear of the anterior cruciate ligament, some atrophy of the posterior cruciate ligament, truncation of the posterior horn of the medial meniscus (possible old trauma), significant osteoarthrosis in the medial and lateral compartments of the knee with considerable osteonecrosis in the medial tibial condyle, bone marrow edema in lateral tibial plateau, fluid collection in the ventral to the distal popliteal vessels and joint effusion.

Dr. Mark Rasmussen examined and evaluated the claimant on January 16, 2012. Dr. Rasmussen reviewed claimant's medical records and also took a history from him. Upon physical examination, the doctor diagnosed claimant as having a chronic ACL tear and medial compartment degenerative joint disease (DJD). Claimant received an injection of Depo-Medrol and Marcaine. Dr. Rasmussen also ordered physical therapy three times a week for three weeks. The doctor removed the fluid off of claimant's right knee and also

[1] P.H. Trans. at 6-7.

prescribed a brace. Dr. Rasmussen also noted that the incident on the ladder did not cause the arthrosis in claimant's knee or the ACL tear. By the time claimant received his brace in late February 2012, respondent had denied his claim on the basis that the accident was not the prevailing factor for his injury.

Claimant then sought medical treatment with his family physician, Darin Cox. Dr. Cox referred claimant to an orthopedic specialist, Dr. Lepse. The doctor performed a physical examination and opined that claimant needed a total right knee replacement on account of his work-related injury.

Dr. Edward Prostic, board certified in orthopedic surgery, examined and evaluated claimant on April 10, 2012, pursuant to an order from the ALJ. The doctor reviewed claimant's medical records and also took a history from him. Claimant advised Dr. Prostic that his right knee was asymptomatic before the work accident. Upon physical examination, Dr. Prostic found claimant had intra-articular effusion, posterior subluxation of the tibial on the femur, and mild tenderness of the medial joint line. X-rays revealed medial joint narrowing with approximately 2 millimeters of joint space persisting and mild degeneration of the patellofemoral joint.

Dr. Prostic opined:

> The findings that are most likely from the accident are the bone marrow edema and abnormal fluid accumulation and my belief is that the actual injury was tearing of the posterior horn of the medial meniscus with aggravation of the bone and joint.[2]
>
> Q. And you mentioned bone contusions and you stated that the dating of origin of these is uncertain. Can you explain what you mean by that?
>
> A. We understand it far better when a person starts off with a normal knee, has a single significant traumatic episode, and on the MRI you have what looks like bone contusion which some of us interpret as being microfractures of the spongy bone without fracture going to the surface of the bone or the cortical surface. Sometimes bone contusions occur without trauma and they often persist for at least four months in symptom production, so it is reasonable that the bone contusion occurred at the time of the accident, but it is possible that it either preceded or postdated. There isn't a way to be certain in this case.[3]

Dr. Prostic testified that claimant had tearing of the medial meniscus which probably had pre-existing tears and that he also had a bone bruise of the medial femoral condyle. Dr. Prostic further opined that claimant's work accident caused additional tearing of his

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[2] Prostic Depo. at 11.

[3] *Id.* at 11-12.

medial meniscus for which in general he would need a partial medial meniscectomy but that it would most likely not give him relief so the total knee replacement arthroplasty is claimant's best treatment option.

Dr. Prostic agreed that claimant's osteoarthritis is the greatest factor leading to the total knee replacement recommendation. But he qualified that opinion and testified:

> Q. . . . The alleged work injury of December 2011 is not the prevailing factor for the need for the total knee replacement, true?
>
> A. I believe it's the prevailing factor in the need for surgery at this time, but for the pre-existing disease he would not need a total knee replacement arthroplasty.[4]

It is essentially undisputed that claimant had an accident at work which produced symptoms of injury in his knee. The dispositive issue is whether the accident was the prevailing factor causing the injury.

K.S.A. 2011 Supp. 44-508(d) defines accident:

> 'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f) (2) provides:

> An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Dr. Prostic, the court ordered independent medical examiner, opined that the accident caused a new tear in claimant's medial meniscus. Consequently, the accident did not solely aggravate, accelerate or exacerbate the preexisting condition in claimant's knee. Moreover, Dr. Prostic concluded that although a torn meniscus is normally treated by a partial medial meniscectomy, in this case because of claimant's preexisting knee condition such treatment would not provide claimant relief and the arthroplasty was the best and appropriate course of treatment. Consequently, Dr. Prostic concluded the December 2011 work injury was the prevailing factor in claimant's need for surgery at this time.

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[4] *Id.* at 26.

K.S.A. 44-510h(a) provides in pertinent part:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicine, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

Simply stated, the accidental injury was the prevailing factor causing claimant's meniscal injury and because of his preexisting degenerative knee condition the appropriate treatment that is reasonably necessary to cure and relieve claimant from the effects of the injury is the knee arthroplasty. The ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 22, 2012, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of August, 2012.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

e: Sally G. Kelsey, Attorney for Claimant, strolelawclerk@gmail.com
Nathan Burghart, Attorney for Respondent and its Insurance Carrier, nburghart@fairchildandbuck.com
Brad E. Avery, Administrative Law Judge

[5] K.S.A. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).